Petition

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NO. 81-____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

ROBERT N. READ, PETITIONER

v.

J. LYNN HELMS, ADMINISTRATOR,
FEDERAL AVIATION ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Is the Court of Appeals required, on review of adjudicatory actions of administrative agencies, to make specific findings as to whether or not each finding of fact of the administrative agency is supported by substantial evidence in the record, when the sole basis of the appeal is the challenge to the sufficiency of the evidence to support certain specified agency findings of fact?

2. Did the Court of Appeals in the present case abdicate its statutory responsibility under the Federal Aviation Act of 1958, as amended, and the Administrative Procedure Act, as amended, to independently weigh the evidence and make its own findings as to whether or not the findings of fact of the Board were supported by substantial evidence in the record?

PARTIES BELOW

All parties to the proceeding in the United States Court of Appeals for the District of Columbia Circuit are contained in the caption of this case.

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OPINIONS BELOW

The opinion of the National Transportation Safety Board is contained in NTSB Order No. EA-1444. The Judgment of the United States Court of Appeals for the District of Columbia Circuit was issued without opinion and was not selected for publication. Copies of the National Transportation Safety Board Order and the Court of Appeals Judgment are included in the Appendix.

JURISDICTION

The Judgment of the Court of Appeals for the District of Columbia Circuit was entered on July 1, 1981. This Petition for Writ of Certiorari is being filed within ninety days of the date of entry of the Judgment. This Court's jurisdiction is invoked under the provisions of 28 U.S.C. §1254(1) (1976).

CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS AND RULES.

The following constitutional provisions, statutes and rules are set forth in relevant part in the Appendix, infra: U.S. Const. Amend. V; 5 U.S.C. § 706 (1976); 49 U.S.C. §§ 1429, 1486 (1976); 14 C.F.R. §§ 91.5, 91.9 (1981); 49 C.F.R. §§ 821.32, 821.47 and 821.49 (1980).

STATEMENT OF THE CASE

Petitioner seeks review of a Judgment of the United States Court of Appeals for the District of Columbia Circuit,

issued July 1, 1981. The Judgment affirmed, without findings of fact, conclusions of law, or opinion, an order of the National Transportation Safety Board suspending Petitioner's airline transport pilot certificate for ninety (90) days.

I. Facts.

Petitioner Robert N. Read is an airline transport pilot who has accumulated over 5,000 hours of flying time. He is presently employed in the capacity of Chief Pilot for Air Pacific, a commuter air carrier in the State of Alaska. He and his family are entirely reliant upon the privileges of his airline transport pilot certificate to earn their livelihood.

On October 14 and 15, 1978, Mr. Read was an employee of Colorado Corporate Charters. On October 14, 1978, he was assigned to fly, and did fly, a passenger-carrying charter flight from Stapleton

International Airport, Denver, Colorado, to Jackson, Wyoming, with the return flight to Stapleton without passengers or cargo. A short distance before Mr. Read reached Stapleton on the return trip, the engines of the aircraft he was flying quit. He made an emergency landing at Jefferson County Airport, Broomfield, Colorado.

II. Proceedings Below.

On October 25, 1979, the Administrator of the Federal Aviation Administration issued an Order of Suspension, charging Mr. Read with violations of Federal Aviation Regulations §§ 91.5 (failing to familiarize himself with all available information concerning that flight, including weather forecasts, fuel requirements and alternatives available) and 91.9 (careless operation), 14 C.F.R. §§ 91.5, 91.9 (1981).

Pursuant to 49 U.S.C. § 1429(a)

(1976) and the Rules of Practice in Air Safety Proceedings, 49 C.F.R. §§ 821.30 et seq. (1980), a hearing was held before an administrative law judge of the National Transportation Safety Board on February 5, 1980, in Denver, Colorado. At the close of the Federal Aviation Administration's case, counsel for Mr. Read moved to dismiss the Administrator's Complaint (the Order of Suspension) on the grounds that the Administrator had failed to establish a prima facie case. The Administrative Law Judge overruled the Motion. At the completion of all the evidence, the Administrative Law Judge affirmed the Administrator's Order of Suspension but modified the length of the suspension from 240 to 90 days.

Mr. Read appealed the Administrative Law Judge's decision to the full National Transportation Safety Board pursuant to the provisions of 49 C.F.R. § 821.47, on

the grounds that the law judge's findings of fact were not supported by a preponderance of reliable, probative and substantial evidence as required by the Board's Rules of Practice in Air Safety Proceedings, 49 C.F.R. §§ 821.32 and 821.49(a) (1980). On June 11, 1980, the National Transportation Safety Board denied Mr. Read's appeal and affirmed the decision of the Administrative Law Judge. In doing so, the Board adopted the law judge's findings as its own.

Mr. Read appealed the Order of the National Transportation Safety Board to the Court of Appeals for the District of Columbia Circuit, pursuant to 49 U.S.C. § 1486 (1976). On July 1, 1981, the Court of Appeals issued its Judgment affirming the Order of the National Transportation Safety Board. The Judgment included no opinion, no findings of fact, and no conclusions of law.

ARGUMENT

I. Introduction and Summary.

The Court of Appeals is clearly in error and has repudiated its statutory duty by failing and refusing to independently examine and weigh the evidence and render its own independent findings as to whether or not each of the findings of fact of the Board is based upon substantial evidence.

This refusal to rigidly apply the "substantial evidence" test operates to deny Petitioner his right to due process of law as guaranteed by the due process clause of the Fifth Amendment to the Constitution of the United States.

II. The Court of Appeals' Duty to Review.

The Courts of Appeals are strictly limited by statute in reviewing the evidentary basis of decisions of the National Transportation Safety Board in cases of this nature. The Federal Avia-

tion Act of 1958, as amended, provides at 49 U.S.C. § 1486(e) (1976) that the Board's Findings of Fact are conclusive, if supported by substantial evidence. The Administrative Procedure Act, at 5 U.S.C. §706 (1976), requires that the reviewing court hold unlawful and set aside agency findings found to be unsupported by substantial evidence in cases reviewed on the record of an agency hearing as required by statute.

Similarly, at the stage of intra-agency review, the full National Transportation Safety Board is required by the provisions of the Rules of Practice in Air Safety Proceedings, 49 C.F.R. § 821.49 (1980) to determine whether or not the Administrative Law Judge's findings of fact are each supported by a preponderance of reliable, probative and substantial evidence.

In Universal Camera Corp. v. N.L.R.B.,

340 U.S. 474 (1951), this Court stated, in reference to similar language in the statutes governing the proceedings of the National Labor Relations Board:

> "It is therefore difficult to escape the conclusion that the plain language of the statutes directs a reviewing court determine the substantiality of the evidence on the record. . . ."

Id., at 493.

In that case, this Court remanded to the Court of Appeals to answer "the comprehensive question whether the evidence supporting the Board's Order is substantial." Id., at 497.

More recently, in Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1970), this Court has confirmed that the provision of the Administrative Procedure Act cited above requires the Court of Appeals, upon review of agency action, to make a specific finding of compliance with the standards

enumerated in the Act. In Illinois Central R. Co. v. Norfolk & W. R. Co., 385 U.S. 57, 66 (1966), this Court reviewed the decision of a court of appeals in an action for judicial review of administrative agency proceedings. This court held that the opinion of the court below must lead this court to conclude that the lower court was applying the test of substantiality.

The primary responsibility of the courts of appeals in applying the "substantial evidence" test to agency adjudicatory proceedings is to assure that due process guarantees have been afforded the citizen and to prevent "rubber stamping" of administrative hearings which could allow or encourage such hearings to deteriorate into mere ritualistic charades.

In the instant case, the court of appeals judgment contains no findings of fact, conclusions of law or opinion.

There is no way to determine, from the court's judgment, whether or how the "substantial evidence" test was applied.

Allowing the Court of Appeals to abdicate its statutory responsibility to independently examine the substantiality of the evidence would destroy any hopes of citizens for meaningful judicial review of due process provided at the administrative agency level. Permitting such neglect by the lower courts would make a mockery of the entire constitutional and statutory scheme for the protection of individual liberties, and would fly in the face of this Court's considerable body of meticulously reasoned decisions in the area of administrative due process.

CONCLUSION

The decision of the District of Columbia Circuit in this case has decided a federal question in a way in conflict

with applicable decisions of this Court and has so far departed from the accepted and usual course of judicial proceedings and sanctioned such a departure by the National Transportation Safety Board as to call for an exercise of this Court's power of supervision. For these reasons, this Court should review this case on writ of certiorari.

HAMILTON & HILL, P.C.

BY:
J. SCOTT HAMILTON
Attorney for Petitioner

CERTIFICATE OF SERVICE

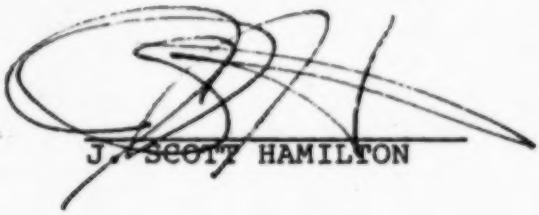
I hereby certify that I did on this 29 day of September, 1981, 3 copies of the foregoing PETITION FOR WRIT OF CERTIORARI were deposited in a United States Post Office, with first class postage prepaid, and properly addressed to each of the following parties:

Solicitor General
Department of Justice
Washington, D.C. 20530

Office of General Counsel
National Transportation Safety Board
Dodge Center, Suite 301
1010 Wisconsin Ave., N.W.
Washington, D.C. 20007

Office of General Counsel
Federal Aviation Administration
800 Independence Ave., S.W.
Washington, D.C. 20591

All parties required to be served have been served.



J. SCOTT HAMILTON

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ENTERED: February 5, 1980

UNITED STATES OF AMERICA

NATIONAL TRANSPORTATION SAFETY BOARD

LANGHORNE B. BOND, Administrator, Federal Aviation Administration,	)	
Complainant,	)	
vs.	)	Docket No. SE-4434
ROBERT READ,	)	Denver, Colorado
Respondent.	)	February 5, 1980

Allan H. Hrowitz, Esq., for Complainant.

J. Scott Hamilton, Esq., for Respondent.

ORAL INITIAL DECISION AND ORDER

ADMINISTRATIVE LAW JUDGE PATRICK G. GERAGHTY: This has been a proceeding before the National Transportation Safety Board held pursuant to the provisons of the Federal Aviation Act of 1975, as amended, and the Board's Rules of Practice in air safety proceedings on the appeal of Robert N. Read, hereinafter

referred to as the Respondent, from an Order of Suspension which seeks to suspend his Airline Transport Pilot's Certificate and any other airman certificates held by him for a period of 240 days. The Order of Suspension which, as is provided by the Board's Rules of Practice, served herein as the complaint, was filed on behalf of the Administrator of the Federal Aviation Administraiton by his Regional Counsel of the Rocky Mountain Region.

This proceeding has been heard by this Administrative Law Judge. As provided by the rules of practice, I have elected to issue an oral decision in this matter.

Following due notice to the parties this matter came on for trial on February 5, 1980 in Denver, Colorado. The Respondent was present and was represented by his Counsel, J. Scott Hamilton, Esquire,

of Denver, Colorado. The Administrator was represented by one of his Staff Counsel, Allan H. Horowitz of the Regional Counsel's office, Rocky Mountain Region.

The parties were afforded full opportunity to produce evidence and to call and examine and cross examine all witnesses. In addition, the parties were afforded the opportunity to propose orally findings of fact and conclusions of law and to argue their cases orally.

AGREEMENTS

Prior to the proceeding, by pleading it was admitted there was no dispute as to the following numbered paragraphs:

One. That the Respondent is now and at all times pertinent was the holder of Airline Transport Pilot Certificate Number 2140458 with Airplane Multi Engine Land, Commercial Privileges, Airplane Single Engine Land Ratings.

That agreement is taken as having

been established for the purpose of the decision.

DISCUSSION

The Administrator seeks the suspension of the Respondent's airman certificates based upon the allegation that at the time the Respondent's operation of Civil Aircraft N1623 Delta, a Piper Turbo Aztec, which was at that time the property of another, that the Respondent failed to adequately familiarize himself with the information required for the proper planning of the anticipated flight and that therefore the Respondent when he ran out of fuel on his return trip to Denver Stapleton Airport did operate in regulatory violation of Section 91.5 of the Federal Aviation Regulations. In addition, it is alleged that the Respondent's failure to properly familiarize himself with all data necessary to properly complete the planned flight, that the Res-

pondent further operated in regulatory violation of Section 91.9 of the regulations and that he operated the aircraft in a careless manner so as to endanger the lives or property of another.

I have considered all of the oral and documentary evidence adduced during the course of the proceeding. That evidence which I do not specifically mention or have reference to should be taken as having been viewed by me as essentially consistent with the evidence that I do discuss or as not materially affecting the outcome of my decision.

Mr. Stroh is employed by the Federal Aviation Administration as a principal operations inspector and holds a Airline Transport Pilot Certificate and has in excess of 12,000 hours. He was assigned as part of his duties to investigate the circumstances surrounding the incident which gives rise to this proceeding.

Essentially those facts may be summarized as they are not in dispute; that is, that the Respondent was on October 15, 1978 operating as pilot in command of a Piper twin engine turbo charged Aztec bearing Civil Action Number N1623 Delta and that on the date in question he was operating the aircraft first as a passenger carrying charter flight from Stapleton Denver to Jackson, Wyoming. Thereafter the Respondent was operating the aircraft on an empty basis. That is, a deadhead basis on a return trip to the Denver Stapleton Airport.

It is further not contested that during the flight and incident thereto, that somewhere northwest of the Jefferson County Airport in Broomfield, Colorado, the engines on the aircraft quit or ceased to function due to fuel exhaustion and thereafter the Respondent landed the aircraft in a landing on Runway 11 at

Jefferson County Airport at which time the airplane was found to be out of fuel.

Mr. Stroh testified as to conversations he had with the Respondent made at some period of time after the incident. The first conversation took place, according to the testimony and Exhibit A-1 on January 26, 1979. In that statement the Respondent is indicated as stating to Mr. Stroh that he, the Respondent, used an economy cruise setting for purpose of the flight. That is for the round trip. However, he could not recall at that time the power setting that he did use. Further, that the Respondent cruised during the period as his flight at an altitude of 12,000 feet. It' also noted in that statement as reported by Mr. Stroh that the Respondent had indicated that on previous flights he had made in this aircraft that the fuel consumption for similar power settings as he used on the

flight in question had been normal.

A further conversation was had with the Respondent by Mr. Stroh at a subsequent period of time. It's noted on the Exhibit A-2 as being on or about January 30, 1979 and again it's reported that the Respondent stated in the conversation that he, the Respondent, had used a reduced power setting during climb. However, he could not recall the power settings that were used during the climb and cruise portions of the flight.

With respect to the flight manual Mr. Stroh did sponsor and it was received through his testimony as Exhibit A-4 which gives the various power settings for turbo, intermediate, economy and long range cruise conditions for the engine settings, fuel consumptions and also indicating on there that this particular aircraft would have 137 gallons of total fuel on board which were usable.

Mr. VanBuskirk is the director of operations for Colorado Corporate Charters which is the organization for which the Respondent was working at the time of the incident and for whom he was flying the aircraft as a charter pilot. Mr. VanBuskirk testified that in the course of his duties with the corporation he had scheduled and assigned the Respondent to operate the particular flight in question as a charter pilot for Colorado Corporate Charters. Mr. VanBuskirk stated that under the company policy preflight planning is the responsibility of the pilot in command of the particular flight and as the Respondent had been assigned to operate this particular flight, that it was his responsbility to conduct that preflight planning for the trip which was scheduled, as I have indicated, to fly round trip from Denver Stapleton to Jackson, Wyoming and back to Denver.

Mr. VanBuskirk indicated that he received a call from the Respondent in which it was relaid to him by the Respondent that the aircraft had been landed with both engines feathered at the Jefferson County Airport. Mr. VanBuskirk stated that in a conversation he inquired of the Respondent what had happened and in the reply the Respondent stated that he thought he had run out of fuel. On the next morning this Witness indicated that he drove out to the Jefferson County Airport with the Respondent and that during that trip out he again inquired of the Respondent of the circumstances. In that conversation the Witness stated the Respondent replied to Mr. Buskirk that both engines ceased to operate over the front range, that the Respondent had therefore feathered both engines and landed at the Jefferson County Airport. Mr. VanBuskirk indicated that at no time

during the conversations did the Respondent ever state that the aircraft had used or burned excessive amounts of fuel.

As to the flight manifest which was Administrator's A-6, it's noted on there under the discrepancy report section there's no indication of discrepancy made by Respondent with respect to this particular flight and the Witness, Mr. VanBuskirk, stated it was company policy and requirement that the pilot would report any discrepancy on the particular trip manifest.

Mr. VanBuskirk indicated that on the next business day following the incident that he noted the Hobbs meter time on the particular aircraft was 4.5 hours and computing therefore a 30-gallon per hour burn for this aircraft at an intermediate range or cruise setting, which he indicated that the company recommended, that in his opinion the Respondent ran out of

fuel or out of gas at the point where he should have. That is, assuming that there was 137 gallons of fuel on board the aircraft and this setting was used, that the aircraft would have been expected to deplete its fuel supply at the point that it did, in fact, run out of gas.

With respect to the maintenance of this aircraft, the above witness did indicate that the aircraft was in for maintenance and that when it was in for maintenance some weeks after this incident, that approximately $15,000 of maintenance was performed on the particular aircraft. However, he also indicated that during the period of time subsequent to this incident to November 6, that the aircraft had been operated for other charters by other pilots and that at no time during that period of time were any problems reported by those

pilots with reference to the fuel system or fuel gauges or fuel meters that were located in that particular aircraft in question.

Mr. Venzara is the president and chief pilot of the Colorado Corporate Charters and holds an Airline Transport Certificate, mechanic's certificate, is a certificated flight instructor and has a substantial amount of time in Turbo Aztecs. He indicates at the time of the incident he was not the chief pilot of the corporation.

The following information was given by Mr. Venzara of the incident: Mr. Venzara went out to Jefferson County Airport to fly the aircraft back to Denver Stapleton. Mr. Venzara said that he found the aircraft at the Jefferson County Airport and the props were feathered. Upon checking the aircraft he determined there was no fuel in the aircraft and

therefore he said he had 70 gallons of fuel placed in the tanks at the Jefferson County Airport and an additional 70 gallons were placed in the aircraft upon its return to Denver Stapleton. That total of 140 gallons would be the total fuel capacity of this aircraft and would indicate that the fuel tanks in my opinion were, in fact, depleted at the time.

Mr. Venzara also indicated that he discussed the incident with the Respondent about two weeks afterwards and inquired at that time what had happened and that in reply the Respondent stated that he had run out of fuel or out of gas, indicating that it had been a "scary situation" for him and further that he had landed and necessarily coasted after the landing to the ramp or tie down area.

This Witness also indicated that subsequent to the incident he flew this particular aircraft as pilot in command

on about three separate occasions and he noted no excessive fuel consumption, nor any other difficulties relating to the fuel system of the particular aircraft. He also indicated that in this operation during the period of time when he was operating as the pilot in command, that he operated the aircraft in accordance with the flight manual and at all times the predictions in the flight manual corresponded with the indications that he received from the various fuel gauges or systems related to the fuel system.

The witness above again indicated that the intermediate power settings were the recommended procedure for use by the Colorado Corporate Charters.

Mr. Strobach was at the time chief pilot for Colorado Corporate Charters and is also at the present time employed by that organization as treasurer. At the time of the incident in his capacity as

chief pilot, part of Mr. Strobach's duties were to fire, hire and train pilots for the coproration.

Mr. Strobach indicated that as chief pilot he advised pilots hired by the company as to the use of the exhaust gas temperature, power settings, preflight planning and other information concerning recommended use of power controls for the operation of their aircraft. In particular, the Witness indicated that it was company policy to recommend the use of the intermediate power setting, particularly with respect to Aircraft 1623 Delta.

The Witness also indicated that it was company policy to furnish to the pilots a cash advance of up to $200 from which the pilots would be expected to purchase gas and upon their return and submission of the receipts they would again be reimbursed by the company, thereby returning the revolving account

back up to the $200 mark.

With respect to this incident, the Witness indicated that the Respondent, in response to why he did not buy gas, stated to this Witness that he did not have the money to buy the gas because he had lost his wallet at some time prior to this particular flight. However, the Witness indicated the Respondent never relaid this information to this Witness, the chief pilot, prior to the meeting that occurred after the incident in question.

With respect to the maintenance on the aircraft, the Witness in his capacity as chief pilot and treasurer indicates that the aircraft was not owned by Colorado Corporate Charters. Apparently it was a leasing type of situation and in any event the arrangement was all maintenance was to be paid for by the particular owner of the aircraft. That is, there was no cost to the Colorado Cor-

porate Charters for maintenance. The corporation apparently arranged for the maintenance to be done by a particular organization and thereafter whatever the fee was, it was paid for by the owner of the aircraft. Therefore, in this Witness's opinion, there was no benefit to Colorado Corporate Charters to delay or overlook or preclude repair of anything on the aircraft since it was to be done without any cost to that particular organization.

Mr. Chapdelaine is employed by the Federal Aviation Administration as an aviation safety inspector. He holds an Airline Transport Certificate and other ratings and has about 4,000 hours, has been a chief pilot, chief flight instructor, and has about 500 hours in a Piper Aztec and about 500 hours in a Turbo Piper Aztec.

Based upon his background, training

and experience and information made available to him from the investigatory file and information contained in the exhibits which have been proffered and received in the course of the proceeding, such surface weather observations, winds aloft for the particular time and route, the aircraft flight manual, he performed a flight time analysis for the trip as it would have been flown by the Respondent at the time in question.

Three separate time analyses were computed by the Witness. One was for turbo cruise, second for intermediate cruise and one for economy cruise. The analysis on the Witness's testimony conforms with the requirements of the flight manual and with the testimony as given by the Respondent in various conversations with the FAA investigators.

With respect to the time analysis on the turbo cruise, the time analysis, it's

indicated by this Witness that a no reserve total consumption would be 151.7 gallons for the flight as conducted by the Respondent. With respect to an intermediate cruise setting selection, the use of the power setting and the other information I have had reference to would indicate a no reserve total fuel requirement of 144.5 gallons and again on this same assumption, using the economy cruise data from the manual that is contained in the exhibit there would be on the analysis a no reserve total fuel requirement of 142.4 gallons. It's indicated that, as I have had reference to, the aircraft manual indicates a total of 137 usable gallons of fuel on this aircraft and that therefore for all three analyses, the fuel requirement exceeds the usable fuel and, in fact, exceeded the total amount of fuel which could be placed on board this aircraft in its four tanks.

In this Witness's opinion as to proper preflight planning, it was this Witness's opinion based upon all of the information and his background and experience, that a prudent pilot should not have attempted a round trip flight of the sort conducted by the Respondent without a refueling stop having been planned at some point in the trip and also, further, that some planning should have been directed to the selection of an adequate alternate airport for the trip in question. The Witness indicated that he thought this was required because one could not safely complete a trip of this duration under the conditions as then existed without risking running out of fuel.

The Witness is also of the opinion that based upon the information available to him and as available during the course of the proceeding, the aircraft did not

consume an excessive amount of fuel and that the aircraft would reasonably be expected or should have, from his statement, run out of fuel and did, in fact, run out of fuel at a point in time or place where the figures as they are made known to him would indicate that the aircraft would be expected to complete the burn of the usable fuel available. Under those facts and circumstances, it was the opinion of the Witness, based on his experience, that the Respondent was careless in his preflight planning for this flight.

With respect to the operation of this particular aircraft, the Witness did indicate that he flew in this aircraft apparently for the purpose of giving a check ride to this Respondent on two occasions prior to the date in question. On one occasion the flight could not be completed because of a problem with the

engine. However, it does appear that the problem was corrected because a second check flight was scheduled and on this witness's testimony the second flight was undertaken and completed with a duration time of between 1.7 and 2 hours during which time, in this Witness's recollection and testimony, the fuel gauges appeared to respond normally and he did not indicate or find any other indication from the operation of the aircraft which would lead him to believe that anything was operating in other than a normal manner.

In the Respondent's case in chief, the Respondent called Mr. Glen Beckley. Mr. Beckley is employed by Frontier Airlines as a mechanic. The Witness holds an airframe and power plant certificate which was issued sometime in 1973 and on the Witness's testimony he was the mechanic that worked on the aircraft in ques-

tion when it was placed into the shop for maintenance in November of 1978. The Witness indicates that at that time he was employed by AirCraftCo Beech as a mechanic and it was in that capacity as shop foreman and head of the shop that he worked on the turbo system of the aircraft and engines of the aircraft.

The Witness testified he found the engines to exhibit a good compression, but in his opinion that the overall condition of the airframe and engines would make it one of the worst maintained or appearing aircraft that he had ever worked upon. The Respondent placed into evidence R-1 which is a list of discrepancies and maintenance repairs conducted with respect to this aircraft during the period of time it was in the AirCraftCo shop which I think was about three weeks or more.

The Witness had reference to several

discrepancies which were listed through here with respect to both mainfold pressure, fuel selector for the cockpit, exhaust pipe cracks, sticking fuel flow gauges, boost pump deficiencies and worn out spark plugs. With out detailing them to any greater extent, the Witness did express an opinion that based upon all of these he did not feel that the aircraft would present to a pilot 100 per cent reliable information as to selection for power settings or functioning because of the deficiencies which he found and corrected during the course of the 100 hour inspection and repair. The Witness also indicated that based upon his background and experience and review of the condition that he found in this aircraft that he was of the opinion that specifically one would not get the manufacturer's forecast fuel consumption data as listed in the particular aircraft manual because

of the deficiencies as they existed in the aircraft fuel system.

The Witness did concede, however, on cross examination that at least one of the problems which had to do with possibly erroneous readings, that is an injector, had been fixed prior to the incident and that the condition did not therefore exist on October 15 of 1978. Further the Witness conceded that he would not be able to state as a matter of fact what the fuel consumption was at the time the Respondent was, in fact, operating the aircraft. That is, he could not relate the data retrospectively from November 6 back to what the condition was at the time of the operation of the aircraft by the Respondent.

The Respondent testified on his own behalf. He is now employed by Rocky Mountain Airways as captain. At the time of the incident he was, of course, employ-

ed by Colorado Corporate Charters as a charter pilot. The Respondent holds a Airline Transport Pilot Certificate, multi engine land, commercial and single engine land ratings and instructor certificate and various ground instructor's ratings.

The Witness testified as to the flight in question. I have already indicated it was a round trip Denver Jackson Denver. The Witness indicated that he performed an inspection of the aircraft prior to his departure, determined that all four fuel tanks were full and was aware of the fact that he had 137 gallons of usable fuel on board.

The Witness stated that he had flown this route before and in any event he did perform a preflight planning and did perform and compute time and fuel requirements based on the weather information that he had obtained that was made avail-

able to him stating that he made these computations for the trip. However, he pointed out with respect to the Respondent's Exhibit R-2, which is a list of computations for this particular night, that the computations that he made at the time were apparently lost or destroyed, but in any event not available and that the computations used in R-2 were made about four months after the incident and specifically that he did not have available to him as he made the computations in R-2 all the weather information that he had on the original computations.

As to the route flown by the Respondent, he does dispute the route selected by Mr. Chapdelaine in his time analyses, indicating that the route was not the same. However, that he therefore believed that the route he actually did fly was a bit longer than the route computed by Mr. Chapdelaine. The Respondent also indi-

cated that for the flight in question, he selected the intermediate cruise for purpose of flying. That is, 30 inches of mainifold, 2400 RPM and thereafter, for the purpose of the on-route portion he used the data given in the flight manual for long range flights; that is, 24 inches of manifold pressure, 2200 RPM so that they would have insured to him the greatest range and lowest fuel consumption that he could possibly select under the power settings recommended for this particular aircraft by the flight manual.

With respect to the recollections used for the computations made by the Respondent, he states that the data used appears to be fairly close to those that he actually did use during this preflight planning for the trip in question. However, he does concede in his testimony, both on direct and on cross, that he did not make notes of the conversations that

he had with Mr. Stroh, that he did not have the actual data that he wrote at the time of the planning for the flight and particularly did not have available for use in his computations for R-2 the winds aloft data which were available to Mr. Chapdelaine.

Under the computations as stated in R-2, the Respondent indicates that under this computations that he could have completed the flight and had 51 minutes reserve of fuel. That is 51 more minutes of flight time with the fuel still remaining under the conditions as he expected them and the power setting he states he selected for the purpose of the flight.

With respect to the Administrator's Exhibit A-1 and 2, the Respondent indicates that he disagreed with some of the informatin as recorded by the Administrator's Witness, Mr. Stroh. The significance in here to me with respect to the

disagreement is that the Respondent did not disagree with the statement in A-1, that he could not remember the power settings that he used at the time of the conversation with Mr. Stroh in January of '79. However, he was able to recall the power setting when he completed Respondent's Exhbiit R-2. Further, that with respect to Exhibit A-2, he did not disagree with the statement that he could not recall in the second conversation with Mr. Stroh the power setting used in climb and cruise, explaining however that he was busy at the time of the second conversation and could not recall those off the top of his head when Mr. Stroh again asked him for those settings.

With respect to the company policy of intermediate cruise power setting selections, the Respondent states that he was not aware of any such policy. However, he did concede that he did not

normally use the long range cruise settings, but did, however, select them for this flight because he knew that he was going to have to get the best range that he could for this second trip that he was undertaking.

That is my view of the evidence as it appears during the course of this proceeding. The proceeding, of course, is a proceeding under Section 609 of the Federal Avation Act and as such the burden of proof is placed upon the Complainant, that is the Administrator, to establish the allegations contained in the complaint. It is, of course, the complaint which sets forth the Administrator's case and the Administrator is bound by the allegations contained in this complaint and can not go beyond the complaint for purposes of either establishing factual allegation or other allegations with respect to sanction.

There is, in my view, only two really significant areas of dispute or credibility requirements within the evidence as it appears here.

There's no dispute that the aircraft ran out of fuel and that the aircraft made essentially a dead stick landing at Jefferson County Airport on the day in question. The real issue is under all of the facts and circumstances was the Respondent careless in attempting the flight as a round trip flight without refueling. There's no dispute that the aircraft was fueled at Denver and not refueled at any point in time prior to the time that he exhausted the fuel supply.

The evidence on the part of the Administrator establishes here that the aircraft for Colorado Corporate Charters, under the testimony of the witnesses, pilots were advised to be operated in an intermediate cruise setting. The evi-

dence also on the part of the Administrator's witnesses with respect to Mr. Stroh particularly is at the time of the conversations Mr. Stroh had with the Respondent, the Respondent could not relate to him any information concerning the power settings that he used during the course of his flight from Denver to Jackson Hole and to the point where the aircraft ceased to operate because of fuel exhaustion. The Respondent indicates now that he used a long range power setting. However, bearing in mind the interests of the witnesses which go to the weight to be attached to their testimony and from my observations of the witnesses and their demeanor during the course of the testimony, I will resolve the issue as to the power settings used in favor of the Complainant.

With respect to the functioning of the aircraft, there is testimony that the

aircraft was operated both by Mr. Chapdelaine and also by the president of Colorado Corporate Charters at periods after the incident in question; that there were other operations conducted on this particular aircraft by other pilots of the company, none of whom experienced or reported at least any difficulties concerning the fuel consumption or excessive fuel consumption or difficulties with the fuel system or any problems related thereto. Mr. Beckley's testimony is impressive as to the discrepancies found in November, 1978 when he exmained the aircraft. However, he was not able to definitively relate these retrospectively to having been, in fact, in existence at the time that the Respondent, in fact, operated the aircraft.

I do not find that, bearing in mind the testimony of the witnesses and the various exhibits as they are here, that

the evidence adduced by the Respondent is sufficient to affirmatively establish that the aircraft was not operating adequately at the time that he experienced his engine stoppages due to fuel exhaustion. I therefore resolve the question as it appears to me as to the exhaustion of the aircraft, of its fuel supply at the time that the Respondent was operating it, bearing in mind that the Respondent was operating it without planning any refueling stop, that the aircraft simply exhausted the fuel supply which was aboard the aircraft in a quantity known to the Respondent because the aircraft under the mode of operation and the intermediate cruise range as I found established by the preponderance of the evidence would be expected to exhaust the fuel usable and on board the aircraft under all of the prevailing conditions as they affected that particular flight.

I further find that under a clear preponderance of the reliable and probative evidence, that the Respondent, bearing in mind that he is an Airline Transport Pilot Certificate holder, failed to exercise the degree of care, judgment and responsibility one would expect of a prudent holder of an Airline Transport Pilot Certificate to insure that he had adequate fuel for a round trip of 4.5 hours for the altitude and weather conditions then know to him and as a consequence of his failure to so allow that he had not adequately planned his flight and he did, in fact, exhaust the usable fuel supply on board that aircraft and as a consequence the aircraft experienced a fuel exhaustion and engine stoppage of both engines and therefore under all of the attendant aspects and circumstances established therien, the Respondent did operate in regulatory violation of 91.5

of the Federal Aviation Regulations and I so find.

With respect to the charge of violation of Section 91.9 of the regulation, it is sufficient to show potential hazard or danger. It is established that the aircraft was the property of another and it does not require a stretching of the imagination to say that duel engine failure due to fuel exhaustion requiring a dead stick landing at night poses at least potential hazard to lives or property of others which may be in the flight path of the aircraft or the property, that is the aircraft itself, which was not then the property of the Respondent. Suffice it to state that under the circumstances I do find and hold that the Respondent did operate in regulatory violation of Section 91.9 of the Federal Aviation Regulations.

With respect to sanction, and I have

already indicated the Complainant under the principles of law which I believe pertain to the pleadings is bound by the complaint as it forms the basis of his proceeding. I also bear in mind that the Respondent is a holder of an Airline Transport Pilot Certificate and although tht certificate may not have been required for the particular type of operation that he was conducting on the day in question, that is particularly the deadhead trip back to Denver Stapleton, nonetheless he is still the holder of the highest type of airman certificate issued to pilots and as such in any operation should be expected to exhibit the degree of judgment, care and responsiblity that one would expect of the holder of that type of certificate. I find that under the circumstances here his failure for some reason to refuel the aircraft at some point during that trip does not measure

up to the degree of judgment, care and responsibility one would expect of the holder of that type of certificate. Nonetheless, under all of the facts and circumstances, I can not find that the circumstances of the incident are sufficient to warrant affirmation of the Administrator's Order as it is issued. That is, the order which seeks suspension for a period of 240 days of all certificates held by the Respondent. I further bear in mind that the 91.9 violation as appears here is in my opinion an included offense within the overall circumstances of the violation of 91.5. I believe it was careless on his part not to refuel the aircraft and not to adequately preflight the aircraft. Therefore, I do not believe that the 91.9 violation adds substantially to the sanction to be imposed herein.

Based on all of the circumstances as

they appear in the case, I therefore would modify the Administrator's Order to apply to a suspension of the Airline Transport Pilot Certificate and attached pilot ratings, but not to the flight instructor's certificate or ground instructor's certificate which have no bearing or were not being utilized at the time of the circumstances under all of the facts and I believe it is sufficient to insure safety in air commerce and the public interest and to act as a deterrent to the Respondent and others similarly disposed to reduce the period of suspension, acknowledging again that he is the holder of an Airline Transport Certificate, to a period of three months and I will so order.

ORDER

IT IS THEREFORE ADJUDGED AND ORDERED:

1. That safety in air commerce and public interest do not require the affirmation of the Administrator's Order as

issued, but rather it be modified as hereinafter set forth.

2. That the Administrator's Order of Suspension be and hereby is modified to provide for suspension of three months. That is, a period of 90 days instead of the 240 days as stated in the Administrator's Order.

3. That the Respondent's Airman's Certificate Number 2140438 with all attached ratings and limitations be, and hereby is, suspended effective 11 days from today and continue thereafter for a period of three months after the certificate should be surrendered to the Regional Counsel of the Rocky Mountain Region of the Federal Aviation Administration.

4. The certificate shall be surrendered by posting in the United States Mail, posted prepaid and properly addressed to the Regional Counsel of the Rocky Mountain Region or by personal delivery

to the Regional Counsel of the Rocky Mountain Region or his designated representative.

5. If the Respondent surrenders his certificate on or before, the period of suspension will run from the day of the actual surrendering and continue in effect for the period specified in the Order. However, if the Respondent fails to surrender his certificate on or before the day of the Order, the suspension shall continue in effect until the certificate shall be physically in the possession of the Administrator for the period specified herein.

Issued this 5th day of February, 1980 at Denver, Colorado.

_____
Patrick G. Geraghty
Administrative Law Judge

SERVED: June 24, 1980

NTSB Order No. EA-1444

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
Washington, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD at its office in Washington, D.C. on the 11th day of June 1980.

LANGHORNE M. BOND, Administrator, Federal Aviation Administration,	)	
Complainant,	)	Docket No. SE-4434
vs.	)	
ROBERT N. READ,	)	
Respondent.	)	

OPINION AND ORDER

Both respondent and the Administrator have appealed from the initial decision of Administrative Law Judge Patrick G. Geraghty, issued orally at the conclusion of the hearing held in this proceeding on February 5, 1980.[1/] The law judge therein

found that a clear preponderance of the reliable and probative evidence established that respondent failed to exercise the degree of care, judgment, and responsibility expected of the holder of an airline transport pilot (ATP) certificate in that he did not insure an adequate fuel supply for the trip in question[2/] resulting in the stoppage of both engines (on the return flight) due to fuel exhaustion. The law judge thereupon affirmed the Administrator's order which alleged violations of sections 91.5[3/] and 91.9[4/] Federal Aviation Regulations (FAR). The law judge also precluded the Administrator from cross-examining respondent on his prior violation history since no previous sanctions were alleged in the complaint. The law judge reduced the sanction from the 240 days imposed by the Administrator to 90 days.[5/]

Respondent, through counsel, has filed an appeal brief in which he argues that the law judge's findings of fact are not supported by a preponderance of the reliable, probative, and substantial evidence.

On appeal, the Administrator contends that the law judge improperly reduced the sanction and clearly erred in prohibiting the Administrator from cross-examining respondent with respect to his prior violation history and from offering into evidence a certified true copy of respondent's prior violation history for the purpose of determining sanction.

The Administrator has filed a reply brief opposing respondent's appeal.

Upon consideration of the briefs of the parties and the entire record, the Board has determined that safety in air commerce or air transportation and the public interest require affirmation of

the Administrator's order, as modified by the law judge to provide a 90-day suspension of respondent's ATP certificate. We adopt the law judge's findings as our own.

The evidence is exhaustively set forth in the initial decision and will only be recited herein as necessary to decide the appeals. At Denver, the four fuel tanks had been topped off thereby providing 137 gallons of usable fuel. Respondent flew to Jackson, the charter passengers were dropped off, and he commenced a deadhead return to Denver. In the vicinity of Jefferson County Airport, one engine quit and shortly thereafter the other engine stopped, both due to fuel exhaustion. Respondent made a dead stick landing at night at that airport without damage to the aircraft or injuries to any person.

Respondent's principal contention is

that at the power settings he selected and based on his computations for the flight, he sould have had a reserve of 51 minutes of fuel for the roundtrip.

A Federal Aviation Administration (FAA) principal operations inspector who investigated this incident testified that he interviewed respondent on two occasions.[6/] In the interviews, respondent related that he used economy cruise to conserve fuel but could not recall the power settings during climb or cruise.[7/] The chief pilot of the charter operation respondent was working for testified that it was the company's recommended practice to fly this aircraft at intermediate cruise. The president of the company stated that the elapsed time of the flight was 4.5 hours[8/] and using a conservation figure of 30 gallons of fuel consumption per hour, respondent depleted the fuel supply at the point one would expect.

This witness also testified that he flew the aircraft several times before and after the incident and noted no excessive fuel consumption.

An aviation safety inspector for the FAA prepared three flight time analyses based on, among other things, surface weather, altimeter settings, and forecasted winds aloft along the entire route.[9/] The calculations for the roundtrip to Denver show that at turbo, intermediate, and economy cruise the aircraft would have used 151.7, 144.5 and 142.4 gallons respectively.[10/]

Respondent testified that because he had a long flight, he used intermediate cruise for climb and then long range cruise. As part of his preflight activities, he had computed the fuel requirements for the trip. Although he did not retain the notes of that calculation, several months after the flight he recon-

structed his earlier calculations.[11/] According to respondent, the recreated information closely conformed with his preflight computations and shows that he would have had sufficient fuel to complete the flight with an adequate margin in reserve. Respondent also testified that insofar as he was aware no recommendation for any power settings was specified by the company.

Respondent called a certificated mechanic with airframe and powerplant ratings who performed engine work on the aircraft, including a 100-hour inspection, 3 weeks after the incident. The mechanic related that the engine and airframe were among the worst he had worked on in his 5 years as a rated mechanic. He testified to numerous discrepancies noted and found, and he believed that the more severe conditions would have existed at the time of respondent's

flight.[12/] He also testified that respondent would not have obtained the manufacturer's forecast fuel consumption and that the aircraft was not operating at 100 percent efficiency. However, he could not say what the fuel consumption would have been on respondent's flight or how much fuel would have been wasted because of the condition of the turbos and exhaust systems.[13/]

The law judge rejected respondent's testimony that he used a long range power setting for the flight and we have no reason to disturb this finding both as a matter of credibility and as a conclusion consistent with the weight of the evidence as a whole. Moreover, the mechanic's testimony is insufficient to shift responsibility for the fuel exhaustion away from respondent. The mechanic was unable to definitively correlate the discrepancies, either individually or

collectively, to an excessive rate of fuel consumption when respondent flew the aircraft. In addition, the fuel consumption on flights shortly before and after the incident was not abnormal, and the location of the termination of the flight coincided with the calculations for fuel exhaustion, the computations for which were based on the normal operation of all aircraft engines and systems. Under these circumstances, we conclude that the fuel exhaustion resulted from respondent's inadequate preflight preparation and planning in that he attempted to fly beyond the limits of the aircraft fuel capacity without stopping to refuel.[14/]

Turning to sanction, the law judge, sua sponte, foreclosed the Administrator from questioning respondent on or introducing a certified true copy of his enforcement history because no previous sanctions were alleged in the complaint.

The law judge's ruling in strictly confining the Administrator to the four corners of complaint was unduly rigid and contrary to precedent. In Administrator v. Mears,[15] the respondent argued that the law judge erred in admitting evidence of prior sanction which had not been alleged in the complaint. The Board disposed of that argument in the following language equally applicable herein:

> It is well settled that prior violations are relevant to the question of sanction. Although the citation thereof generally is and should be made in the complaint, we cannot conclude that failure to do so in this instance bars consideration of the prior violations since it was as much within the knowledge of respondent as the Administrator.[16]

At the same time, consideration of respondent's prior record does not dictate reinstatement of the 240-day suspension imposed by the Administrator. The Board has generally applied a 30-day

suspension in cases of a forced landing due to fuel exhaustion and fuel starvation.[17] In light of this precedent, respondent's prior record,[18] and the fact that he uses his certificate for his livelihood,[19] we believe that a suspension for 90 days is more appropriate and is sufficient to deter respondent and others similarly situated from committing like violations in the future.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal be and it hereby is denied;

2. The Administrator's appeal be and it hereby is denied;

3. The law judge's decision be and it hereby is affirmed; and

4. The 90-day suspension of respondent's ATP certificate shall commence 30 days after service of this order.[20]

KING, Chairman, DRIVER, Vice-Chairman, McADAMS and GOLDMAN, Members of the Board, concurred in the above opinion and order. BURSLEY, Member, did not participate.

ENDNOTES

1/ A copy of the initial decision as excerpted from the hearing transcript is attached.

2/ The flight occurred on or about October 15, 1978 with respondent as pilot-in-command of a Piper twin engine turbo charged Aztec (PA-23) on a passenger carrying charter flight from Stapleton International Airport Denver, Colorado, to Jackson, Wyoming, with a deadhead return to Denver.

3/ Section 91.5 provided in pertinent part:
"§91.5 Preflight action.
Each pilot in command shall, before beginning a flight, familiarize himself with all available information concerning that flight. This information must include:
(a) For a flight under IFR or a flight not in the vicinity of an airport, weather reports and forecasts, fuel requirements, alternative available if the planned flight cannot be completed, and any known traffic delays of which he has been advised by ATC."

4/ Section 91.9 states:
"§91.9 Careless or reckless operation.
No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

5/ The suspension applied to respondent's ATP certificate and attached pilot ratings but not to his flight or ground instructor's certificate (Tr. 169).

6/ The records of interview are contained in Exhibits A-1 and A-2.

7/ The FAA approved manual for this aircraft specifies the power settings for the four cruise categories which are, in descending order of fuel consumption, turbo, intermediate, economy, and long range (Ex. A-4).

8/ This figure was derived from the Hobbs meter onboard the aircraft and is recorded on the flight manifest (Ex. A-6). That meter on this aircraft is activated when the gear is up and locked; therefore, it does not include time for runup, taxi, and portions of takeoff and landing.

9/ These analyses are Exhibits A-11 through A-13.

10/ An analysis for long range cruise was not prepared because there was no indication in the FAA files that respondent used that category of cruise.

11/ For the reconstructed figures see Exhibit R-2.

12/ The work order consisted of 23 pages (Ex. R-1) and the maintenance cost $15,000.00.

13/ With respect to certain specific components, he stated that the exhaust gas temperature instrument would not be "entirely accurate" because of a mispositioning of its probe and leaking gaskets would impair the efficiency of the turbo charger "a little bit".

14/ Respondent had been given a $200.00 revolving cash advance to purchase fuel.

15/ 2 N.T.S.B. 1943 (1975).

16/ Id. at 1944. (footnote omitted). For an example of an agency which limits the disclosure of a prior record to law judges before they have decided the merits, see 46 CFR 5.20-160.

17/ Administrator v. Rice, Order EA-1009, served May 23, 1977 and cases cited therein. But see Administrator v. Whitacre, Order EA-1108, served February 3, 1978 where a 12 day suspension was imposed.

18/ The copy of respondent's record indicates that in 1974 his certificate was suspended for 120 days and thereafter until he was able to satisfactorily pass an oral examination with particular emphasis on general operating and air traffic rules. The order stemmed from respondent's operation within an airport traffic area, for purposes other than takeoff or landing, without authorization from Air Traffic Control, and his operation within a control zone beneath the ceiling when the ceiling was less than 1000 feet.

19/ Respondent was terminated the day after this incident but at the time of the hearing, he was employed by Rocky Mountain Airways as a captain.

20/ For the purposes of this order, the respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to section 61.19(f), FAR.

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 80-1925 September Term, 1980

Robert N. Read, Petitioner

v.

National Transportation Safety Board, Respondent.

PETITION FOR REVIEW OF AN ORDER OF THE NATIONAL TRANSPORTATION SAFETY BOARD

Before: McGOWAN, WILKEY and WALD, Circuit Judges

J U D G M E N T

This cause came on to be heard on a petition for review of an order of the National Transportation Safety Board and was argued by counsel. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the Court. See Local Rule 13(c). On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court, that the order of the National Transportation Safety Board under review is affirmed.

Per Curiam For The Court

George A. Fisher, Clerk

U.S. Const. Amend. V

No person shall be. . .deprived of life, liberty, or property, without due process of law. . . .

Federal Aviation Act of 1958 § 609,
49 U.S.C. § 1429 (1976)

(a) The Administrator may, from time to time, reinspect any civil aircraft, aircraft engine, propeller, appliance, air navigation facility, or air agency, or may reexamine any civil airman. If, as a result of any such reinspection or reexamination, or if, as a result of any other investigation made by the Administrator, he determines that safety in air commerce or air transportation and the public interest requires, the Administrator may issue an order amending, modifying, suspending, or revoking, in whole or in part, any type certificate, production certificate, airworthiness certificate, airman certificate, air carrier operating certificate, air navigation facility certificate (including airport operating certificate), or air agency certificate. Prior to amending, modifying, suspending, or revoking any of the foregoing certificates, the Administrator shall advise the holder thereof as to any charges or other reasons relied upon by the Administrator for his proposed action and, except in cases of emergency, shall provide the holder of such a certificate an opportunity to answer any charges and be heard as to why such certificate should not be amended, modified, suspended, or revoked. Any person whose certificate is affected by such an order of the Administrator under this section may appeal the Administrator's order to the Board and the Board may, after notice and hearing amend, modify, or reverse the Administrator's order if it finds that safety in air commerce or air transportation and the public interest do not require affirmation of the Administrator's order. In

the conduct of its hearings the Board shall not be bound by findings of fact of the Administrator. The filing of an appeal with the Board shall stay the effectiveness of the Administrator's order unless the Administrator advises the Board that an emergency exists and safety in air commerce or air transportation requires the immediate effectiveness of his order, in which event the order shall remain effective and the Board shall finally dispose of the appeal within sixty days after being so advised by the Administrator. The person substantially affected by the Board's order may obtain judicial review of said order under the provisions of section 1006, and the Administrator shall be made a party to such proceedings.

Federal Aviation Act of 1958 § 1006
49 U.S.C. § 1486 (1976)

(a) Any order, affirmative or negative, issued by the Board or Administrator under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act, shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

(b) A petition under this section shall be filed in the court for the circuit wherein the petitioner resides or has his principal place of business or in the United States Court of Appeals for the District of Columbia.

* * *

(d) Upon transmittal of the petition to the Board or Administrator, the court shall have exclusive jurisdiction to affirm, modify, or set aside the order complained of in whole or in part, and if need be, to order further proceedings by the Board or Administrator. Upon good cause shown and after reasonable notice to the Board or Administrator, interlocutory relief may be granted by stay of the order or by such mandatory or other relief as may be appropriate.

(e) The findings of facts by the Board or Administrator, if supported by substantial evidence, shall be conclusive. No objection to an order of the Board or Administrator shall be considered by the court unless such objection shall have been urged before the Board or Administrator or, if it was not so urged, unless there were reasonable grounds for failure to do so.

(f) The judgment and decree of the court affirming, modifying, or setting aside any such order of the Board or Administrator shall be subject only to review by the Supreme Court of the United States upon certification or certiorari as provided in section 1254 of title 28, United States Code.

Administrative Procedure Act of 1966,
5 U.S.C. § 706 (1976)

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

* * *

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

* * *

(e) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

In making the foregoing determination, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Rules of Practice in Air Safety Proceedings, 49 C.F.R. § 821.32 (1980)

In proceedings under section 609 of the Act, the burden of proof shall be upon the Administrator.

Rules of Practice in Air Safety Proceedings, 49 C.F.R § 821.47 (1980)

A party may appeal from a law judge's order or from the initial decision by filing with the Board and serving upon the other parties (pursuant to § 821.8) a notice of appeal within 10 days after an oral initial decision has been rendered or a written decision or an order has been served.

Rules of Practice in Air Safety Proceedings, 49 C.F.R. § 821.49 (1980)

On appeal, the Board will consider only the following issues:

(a) Are the findings of fact each supported by a preponderance of reliable, probative, and substantial evidence?

(b) Are conclusions made in accordance with precedent and policy?

(c) Have any prejudicial errors occurred?

Federal Aviation Regulations,
14 C.F.R. § 91.5 (1981)

Each pilot in command shall, before beginning a flight, familiarize himself with all available information concerning that flight. This information must include:

(a) For a flight under IFR or a flight not in the vicinity of an airport, weather reports and forecasts, fuel requirements, alternatives available if the planned flight cannot be completed, and any known traffic delays of which he has been advised by ATC.

Federal Aviation Regulations,
14 C.F.R. § 91.9 (1981)

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.